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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5025

FRANCIS HAINES,

Petitioner,

vs.

OTTO J. KERNER, Former Governor, State of Illinois, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of petitioner's civil rights complaint is reported at 427 F. 2d 71 (7th Cir. 1970) and reproduced in the Appendix at pp. 65-66. The opinion of the United States District Court for the Northern District of Illinois is not reported and is set forth in the Appendix at pp. 58-60.

JURISDICTION

The petition for writ of certiorari was filed on September 17, 1970 and was granted on March 8, 1971 at 401 U.S. 954. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, . . ."

The Sixth Amendment provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATUTORY PROVISIONS

Title 42, § 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress.

Questions Presented For Review

1. Whether the circumstances of petitioner's confinement in the isolation unit of the Illinois State Penitentiary at Menard, for a serious violation of prison rules, constituted cruel and unusual punishment?

2. Whether the prison disciplinary procedures by which petitioner was confined after he admittedly struck another inmate over the head with a shovel are commensurate with due process of law.

STATEMENT OF THE CASE

On March 10, 1968, inmates Haines, Moore, and Doherty were working on the prison detail known as the Inside Yard Gang. Officer Paul T. Duncan was the staff member in charge of this work assignment.[1] (A. 14). While working, Haines, Doherty, and Moore began arguing over which segment of the inmate population would informally control the inmates. Haines stated that Moore was inciting Doherty against him. Several times during the argument, both of the younger inmates made it clear that the "Young Blood" within the penitentiary was taking control and that the "Old Blood (like Haines) was done." (A. 14).

After the initial verbal confrontation, Haines left Moore and Doherty for a brief period to inspect a pile of cinders. On Haines' return to the Yard Gang, he, Moore, and Doherty resumed the argument over who was

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1. Haines was 65 years old and was approximately 30% disabled due to foot injuries. Inmate Moore and Doherty were near thirty years of age.

going to assume the role as group leader, the "Young Blood" or the "Old Blood." Prisoners Doherty and Moore warned Haines that he had better watch out or he would be hurt. Haines answered the inmates by stating that "they could hop on at any time they felt like it and he had never run once, did not intend to start then." (A. 14-15).

Shortly thereafter, the three prisoners entered a bath room. The argument continued. One of the two younger inmates asked Haines if he wanted to start something. Haines then struck Doherty over the head with a shovel. The ensuing scuffle was broken up by Officer Duncan. (A.15).

Officer Duncan immediately rendered first aid to Doherty. During inmate Doherty's and Officer Duncan's absence, Moore threatened Haines, who responded by informing Moore that he could resume the matter at any time he chose.

Officer Rogers then escorted petitioner to the disciplinary unit to appear before Russell Lence who was the disciplinary officer that day. Before Officer Lence, Haines admitted hitting Doherty with the shovel but refused to further explain his actions. Haines was placed in an isolation cell until a further investigation could be made by Officer Duncan and a report submitted. (A. 15-16).

After completion of the investigation of the fight between Haines, Moore, and Doherty, Officers Lence and Rogers called petitioner before them and read the formal report of Officer Duncan to him. When Haines was given the opportunity to respond to the report, he refused to talk about the incident or the report other than to object to the statement of Duncan that he (Haines) had hit the shovel on the yard gang shack floor. (A. 15-16).

After the disciplinary hearing, Haines was placed in isolated confinement for 15 days, from March 10 to March 25, 1968. He was given three blankets to sleep on. The cell was dark but contained toilet facilities. He received a complete noon meal and two slices of bread every morning and evening. No towel or soap was furnished. (A.16).

On being removed from punitive segregation[2] on March 25, 1968, Haines received notice that the Prison Merit Staff had reduced him to "C" grade, which meant

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2. Punitive Isolation and Administrative Segregation are not synonymous. According to the American Correctional Association, Manual of Correctional Standards, and under the privailing Illinois practice, punitive segregation consists of seperation from other prisoners, a restricted diet and loss of most privileges. Punitive segregation is not applied on an indefinite or permanent basis and, when punitive segregation involves a restricted diet, it is never continued for more than fifteen days. The cells may not be wholly dark. Toilets and sinks may be provided in the cells but may be omitted from some cells which are used by inmates who persist in destroying such equipment. The cells should be designed to prevent the inmate from creating disturbing noises and communicating with other inmates. The interior of the cells must be fully visible to correctional officers standing outside the cell. This is to insure proper supervision, to prevent mutilitation suicide or damage to equipment in the cell.

Administrative segregation is designed for inmates who have demonstrated their inability to live in peace with the general population or who require protection from other inmates. In essence administrative segregation is a seperate prison within a prison—sometimes housed in its own building and sometimes in a seperate section of a regular prison building. Normal prison privileges are enjoyed by the inmates. Educational, medical, religious

that Haines could not purchase certain items at the prison commissary for a designated period.

On July 1, 1968, Haines filed a complaint based upon these disciplinary proceedings in the United States District Court for the Northern District of Illinois seeking a total of $500,000 damages, a declaratory judgment, and any further relief as justice and equity may require against Otto J. Kerner, Governor of the State of Illinois, Ross V. Randolph, Director of Public Safety (now Department of Corrections); Max P. Frye, then Warden; then Assistant Wardens, Lewis C. Lence and Jeffie Biggs; Officers Paul V. Sympson, Russell Lence, E. Rogers, William Sheets (Commissary), Paul T. Duncan; and Donald Gentsch (Record Clerk). (A. 7).

After granting the petitioner twenty days in which to answer the respondents' motion to dismiss, the District Court dismissed Haines' complaint without a hearing on December 18, 1968. On May 25, 1970, the Court of Appeals affirmed the District Court's dismissal of Haines' complaint stating:

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and other activities are maintained to the extent practicable in administrative segregation. The primary difference between administrative segregation and the general penitentiary is greater individual attention in segregation and an emphasis on protecting the personal security of the inmate. In particular activities in administrative segregation are conducted on an individual or small group basis. The goal of administrative segregation is to try to bring as many of its inmates as possible to the point where they can safely be brought into the general prison population.

See Manual of Correctional Standards, The American Correctional Association, Ch. 13, pp. 247-248 (3rd ed., 1st printing 1966).

> "State prison officials are vested with wide discretion, and discipline reasonably maintained in state prisons is not subject to our supervisory direction.
>
> * * *
>
> Apart from purely conclusory statements, the allegations of Plaintiff's Complaint do not show that the Defendants acting under color of state law or in conspiracy abridged his Constitutional rights, privileges or immunities within the scope of the Civil Rights statutes on which he relies." *Haines* v. *Kerner,* 427 F. 2d 71, (7th Cir. 1970).

This Court granted Haines' petition for Writ of Certiorari on March 8, 1971.

SUMMARY OF ARGUMENT

While an inmate of the Illinois State Penitentiary at Menard, the petitioner struck another inmate over the head with a shovel following a verbal disagreement. This act was witnessed by a third inmate and admitted by petitioner. Following an investigation by prison officials, the petitioner was shown the investigation report and given an opportunity to make a statement. Haines refused to say anything other than to correct minor factual statements in the report. As discipline for violation of the prison rule against fighting, petitioner was isolated from the general prison population for fifteen days. He now complains that this isolation is cruel and unusual punishment in violation of the eighth amendment to the federal constitution, and further, that he was denied due process of law in the prison disciplinary proceedings. Reference to history and relevant case law clearly establish the invalidity of these complaints.

The historical origins of the eighth amendment prohibiting cruel and unusual punishment reflect that the

provision was intended by the framers of the Constitution to eliminate sanguinary, public punishments which prevailed both in England and the United States during the colonial period of American history. This reaction against sanguinary punishments also resulted in the first prison system in the United States. Although replaced with imprisonment as punishment for a criminal offense, sanguinary punishments persisted as disciplinary measures for enforcement of prison rules until the reformative disciplines of isolation, silence and hard labor were introduced as methods of enforcing prison rules. Thus, the punishment of isolation was a reform mode of prison discipline, replacing the harsher sanguinary punishments once utilized within this country's prisons.

Pertinent case law governing the limits of judicial scrutiny of internal prison discipline has established that the judgment of prison officials concerning matters of internal prison discipline or security is not reviewable absent a showing that punishment imposed for a prison rule infraction is unreasonable, cruel or unusual.

When judged in the light of relevant case law and modern penological recommendations, the factual circumstances of petitioner's confinement in isolation for fifteen days was neither unreasonable nor cruel and unusual. Rather, this action was necessary to the maintenance of proper prison discipline and security.

Petitioner was disciplined only after a complete investigation of the incident by prison officials after the petitioner's initial admission of the infraction. During the investigation, Haines was confronted by the accusation, informed of the evidence against him and afforded a reasonable opportunity to explain his actions. Within the context of administering prison discipline, the requirements of due process have been fully met.

ARGUMENT

I.

THE ALLEGED CONDITIONS OF PETITIONER'S CONFINEMENT IN THE ISOLATION UNIT OF MENARD PENITENTIARY FOR A SERIOUS VIOLATION OF PRISON RULES DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The Petitioner here complains not of punishment he has received for the crime of which he was convicted, but rather of his temporary transfer from the general prison population to a unit isolated from most other prisoners. The transfer resulted from a rather substantial violation of the rules and regulations of the Illinois State Penitentiary.

The resolution of petitioner's complaint requires reference to the exact meaning of "cruel and unusual punishment" as the phrase is used in the eighth amendment to the federal Constitution. Two subjects are relevant to this determination: First, the historical meaning of the phrase at the time of its inclusion in the Constitution; and second, judicial interpretations of the constitutional provision, along with the policy considerations relevant to the application of the prohibition to internal prison disciplinary matters. See *Sostre* v. *McGinnis*, 442 F. 2d 178, 191 (2nd Cir. 1971). Respondents will establish the basic invalidity of petitioner's argument on each of these levels.

A.

Historical Perspective—The Eighth Amendment And Discipline In Prisons.

The question of punishment was easily resolved in the laws of an earlier era. An eye for an eye and a

tooth for a tooth[3] was a relatively clear standard to apply. With the substitution of social punishment for revenge in kind, the question of excessive penalties immediately arose[4] and was articulated in the Magna Carta as the problem of cruel and unusual punishments. While Chapter 14 of the Magna Carta applied on its face only to fines[5] by 1615 it was applied to forms of imprison-

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3. Exodus 21:25; Leviticus 24:19-21. See also, Aristotle, Ethics 148-149 (1955): T. Dufwa, The Vikings Laws and the Magna Carta 51-52 (1963).

4. Granucci, Nor Cruel and Unusual Punishments Inflicted; The Original Meaning. 57 Cal. L. Rev. 839 (Oct. 1969).

5. "A free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his Merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. (4) And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. (5) Earls and Barons shall not be amerced but by their Peers, and after the manner of their offense. (6) No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his laytenement, and after his Laytenement, and after the quantity of his offence." See also: Am. Jur., 2d Desk Book 42, 45 ——; the Magna Carta was initially issued by King John, June 15, 1215 but was annulled by the Pope at the King's request after being law for only nine weeks. However, the document was confirmed with some changes in 9 Hen. III and 25 Edw. I. This text is from the confirmed charter of 25 Edw. I. See Plunkett, A Concise History of the Common Law, 23 (1966).

ment. *Hodges* v. *Humkon,* Reports of Edward Bulstrode, Cases in the Kings Bench. 139-40 (2d ed. 1688).

In the year 1688, during the reign of William and Mary, the phrase "cruel and unusual punishment was drafted into the tenth declaratory clause of the Bill of Rights which reads:

> "The excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6]

This clause was transcribed verbatim into the Virginia Declaration of Rights of 1776 and 'with little variaion' appears in the Eighth Amendment to the Constitution of the United States.

The exact purpose of the enactment of the cruel and unusual punishment clause of the English Bill of Rights of 1689 is not unequivocal. However, there is substantial historical evidence that the phrase as originally drafted was intended to prohibit only severe punishment unauthorized by statute and not within the jurisdiction of the court to impose rather than to prohibit any specific method of punishment.[7]

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6. 1 W. & M., c2, § 2 (1689); 1 J. Stephen, History of the Criminal Law in England 490 (1883).

7. That the phrase was originally intended to prohibit specific forms of punishment is a popularly held misconception. Compare Granucci, supra at note 5, at 852-60 with I Brant, the Bill of Rights 155 (1965). It is an interesting note that executing male rebels by drawing and quartering continued until 1814. 54 Geo. III, c 146 (1814). Beheading and quartering was not eliminated until 1870. 33 and 34 Vict., c 23, § 31 (1870). The burning of female felons continued in England until 1790, 30 Geo. III, c. 48 (1790). The use of the pillory was not

Whether by new design or misinterpretation,[8] the drafters of the Eighth Amendment clearly directed its prohibition against punishment, then perceived as torturous.[9] The Annals of Congress record the following discussion of the clause:

> "Mr. Smith, of South Carolina, objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite." Mr. Livermore [of New Hampshire]. The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future prevented from inflicting these punishments because they are cruel? If a more lenient mode of

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abolished until 1837 by 7 Will. IV and 1 Vict., c. 23 (1837). Whipping as a common law penalty for misdemeanors was not abolished for females until 1820, Geo. IV, c. 57 (1820) and generally by the Criminal Justice Act of 1948 11 and 12 Geo., VI, c. 58, § 2 (1948).

8. See 4 Blackstone, Commentaries on the Laws of England Ch. 29, pp. 369-72; G. Keeton, Lord Chancellor Jeffreys and the Stuart Cause (1965). J. Pollack, The Popish Plot (1903); and, 10 Cobbett's Complete Collection of State Trials col. 1325 (Howell ed. 1811).

9. For a discussion of the general severity of the English criminal law during the eighteenth century, see 1 J. Stephen, History of the Criminal Law in England 457-92 (1883); I Radzinowicz, A History of English Criminal Law. 24-25 (1948).

correcting and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind. The question was put on the clause, and it was agreed to by a considerable majority."[10]

The concern with the sanguinary punishments[11] prevalent during the colonial period of American history prompted not only the enactment of the Eighth Amend-

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10. Annals of Congress, Vol. I., pp. 781-82 (Aug. 17, 1789). In the United States, for federal offenses, whipping and standing in the pillory were not abolished until the act of February 28, 1839, c. 36, § 5 (5 St. 322); at which time imprisonment at hard labor was substituted for nearly every other ignominious punishment, not capital.

11. S. Knapp, Life of Thomas Eddy, p. 56 (1836). A noted Quaker philanthropist, Thomas Eddy, living during the period of the beginning of the American independence, wrote of the age:

"The tears of the sympathetic, and the voice of the benevolent, had made but slow progress against the apathy of the great mass of mankind, and the vindictive spirit of a few, who believe, or profess to believe, that the world should be governed by a rod of iron. The hearts of the people were made callous by the sight of stocks, whipping posts, pillories in every shire town or considerable village. Flagellation with the cat-o'-nine tails, burning in the hand or forehead with a hot iron, cropping the ears of prisoners in the pillory, were all common sights to the youngest as well as the oldest portion of the community."

ment, but also resulted in the first organized prison system in this country.[12] Prior to 1786, there were no formal prison systems in the United States. Places for permanent punishment or for reformation were not contemplated by the people since public physical punishment and capital punishment were deemed generally adequate for penal purposes. Prisons prior to the late 1700's were merely local jails used generally for brief pre-trial detention or for short periods of imprisonment.[13]

Initially, imprisonment within the penitentiary was a device of the Quakers to combine effective custody and

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12. Between the years 1682 to 1717, William Penn, attempted, in his Frame of Government to abolish tortures and bloody punishments for criminals and to substitute the penalties of imprisonment at hard labor, floggings, fines, and forfeitures. However, Penn's effort to change the penalty practices of the time were repealed by Queen Anne and the common sanguinary laws were restored in 1719. 1776, however, led to the formation of the first prison society in either America or Europe—the "Philadelphia Society for Assisting Distressed Prisoners." After the Revolution, the society regrouped and called themselves the Philadelphia Society for Alleviating the Misuses of Public Prisoners." During the late 1700's the Society of Friends, in the United States began their efforts to abolish the death penalty, and joined movements to end sanguinary punishments, and generally to improve the conditions of inmates in local jails. By 1790, the work of the prison reform societies had laid sufficient groundwork for the beginning of a formal prison system in the United States.

13. See generally, O. Lewis, The Development of American Prisons and Prison Customs: 1776-1845, pp. 1-24 (1922).

punishment of criminals with humane treatment. Imprisonment during the late 1790's and early 1800's was the reform penologists' answer to public capital and corporal punishment.[14]

In the year 1790, prompted by the Society of Friends, the Pennsylvania Legislature provided that the jail, located at Walnut Street, Philadelphia (which has been constructed in 1773 and used as a pre-trial detention facility) should be remodeled into a new prison institution. The renovated structure should receive two classes of prisoners: those who had been convicted of serious offenses, and those convicted of crimes of lesser severity. The more serious offenders were to be confined in sixteen solitary cells, initally without labor or reading materials for long periods of their sentence, with one meal a day consisting of a coarse pudding of maize and molasses, asquiring only after a specified time the privilege of working and reading in their cells. Persons who had been convicted of crimes that were formerly punishable by death were to spend from one-twentieth to one-half of their term in solitary confinement. The other inmates were to work in shops during the day in association with each other.

"The building that contained [these] 16 solitary or separate cells, which was called the "penitentiary house" after the term introduced into England by John Howard, was of plain brick, and 160 feet by 80 in size. Each cell was 8 feet long, 6 feet wide, and 10 feet high, had two doors, an outer wooden one, and an inside iron door. A passage ran through the middle of the floor, separating the cells, just as in most buildings for the lodging of any considerable number of persons the interior hall

14. Id., at 26.

runs down the center of the floor, with rooms on each side of the corridor. A stove in the corridor was to warm the rooms. Each cell had a large leaden pipe that led to the sewer, and thus formed a very primitive kind of a closet. The window of the cell was secured by blinds and wire, to prevent anything being passed in or out. The convicts in the solitary cells were not to labor; the other convicts worked in shops during the day."[15] In 1839, Doctor Julius, a noted penologist, described this "penitentiary house" as the "cradle of the American system of reformative prison discipline."[16]

The Walnut Street Prison[17] abolished three significant and bothersome evils of the local jails: namely, the

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15. Id., at 26-27.

16. Id., at 27.

17. In 1773, three years before the first American prison society was founded in Philadelphia, John Howard, an English gentleman, began visiting the European prisons in order to ascertain and publicize their disorders in hope of legislative correction. Upon publication of his works in 1777, he became known worldwide as the great authority on prison discipline, construction and reform. If not directly, at least indirectly, he was the guiding spirit of our American prison system in many respects. At a minimum, he was a substantial influence on American penal reform between 1780 and 1800. Caleb Lownes, dominant Quaker figure in the management of the Walnut Street Penitentiary was a close reader of Howard's works and used them as a material guide in establishing the first State prison of Pennsylvania. It is interesting to observe John Howard's suggested modalities of punishment for the violation of prison rules drafted in his "General Heads of Regulations Proposed To Be Established in Penitentiary Houses or Houses of Corrections." "Abridgment of diet—or coarser kind—hard or

commingling of the sexes in large dormitory-like rooms, the use of spiritous liquors, and the indiscriminate confinement of debtors and witnesses with those confined for criminal offenses. This early prison was founded upon the concepts of inmate labor and humane treatment, and for the next forty years, was the model for state penitentiary systems.

While at one time a violation of prison rules often invoked severe corporal punishment,[18] the fifty years of

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disagreeable work—marks of disgrace; wearing collar, Ic—stripes—term lengthened on attemps to escape—shutting up the refractory in strong rooms—solitary confinement and work." J. Howard, The State of the Prisons in England and Wales, Introduction, p. 2, Tables, p. 472 (1777).

18. (a) Punishment in the year 1814 in the Massachusetts State Prison for an assault upon another inmate:

"That he wear an iron collar round his neck for 90 days and a clog on his left leg for 6 months, and that during this whole time he be chained to his workbench; that he sleep in solitary confinement for 6 months, and that during that period he receive only bread and water for his supper; that he be brought into the inner yard on the four succeeding Saturdays, between the hours of three and five in the afternoon, and be placed for one hour on an elevation, and a label on his breast with these words: 'For stabbing two fellow prisoners; that no letter pass to or from him, or that any relative or friend visit him during his confinement, or any convict speak to him; and in case, during the performance of any part of the sentence, he be guilty of any misconduct, such parts of the sentence as have been inflicted be considered as null, and he shall be

prison experience subsequent to the enactment of the Eighth Amendment reflects that the disciplines of silence, solitary confinement, and hard labor were viewed as

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held to suffer the same over again." Lewis, supra note 16, at 72.

(b) Graded system of punishments for the Violation of Prison Rules applied prior to 1835 in the Eastern Penitentiary of Pennsylvania:

"The first and mildest punishment was a deprivation of the use of the exercise yard by the convict for a given period. The second stage of punishment included the forfeiture of a dinner for a period of from two to three weeks—in other words, a serious reduction in rations. For severer cases, the dark cell was employed; this being an ordinary cell from which light was totally excluded. Often even the single blanket was denied the prisoner. Every twenty-four hours the convict receive eight ounces of bread and some water. His sufferings were intense, especially in cold weather. One convict had been held in the dark cell for forty-two days, and was suffering from starvation and delirium when taken out.

The next degree of punishment in an ascending scale was the absolute deprivation of food, for a period of not over three days. A further stage was reached with the infliction of "ducking," in which process the convict was suspended from the yard wall by the wrists, and drenched with buckets of cold water, the degree of severity of which depended upon the state of the atmosphere.

The 'mad or tranquilizing chair' was another instrument of corporal punishment. It was a large box-chair made of planks. The convict was strapped in the chair and his hands were handcuffed. For the feet there was no resting place. It was not possible to move body or limbs, and the consequent pain was intense. Arms and

reformative methods of punishing prison rule infractions. See generally, O. Lewis, The Development of American Prisons and Prison Customs: 1776-1845 (1922).

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legs swelled frightfully. Even while in this position prisoners had been beaten.

The 'straight-jacket,' another punishment, was a sack or bagging cloth of three thicknesses, with pocket-holes in the front for the admission of the hands. In the back there were rows of eyelets, whereby the jacket might be laced up. The jacket was forced over the head of the convict, and his hands were inserted in the pockets; a collar was fitted about the neck, but the head was left free. The jacket was kept upon the prisoner for from four to nine hours. Convicts in the Eastern Penitentiary had been so tightly laced into the jacket that their necks and faces were black with congealed blood. The torture could be made excruciating. One convict was reported to have lost the use of his hand. Men of the stoutest nerve would shriek as if on the rack.

The 'gag' was the severest and most complicated of the punishments. It was under this treatment that an insane convict died, thus precipitating the investigation. The gag resembled the stiff bit of a bridle, having an iron 'palet' or mouthpiece in the center, and chains at each end. It was placed in the mouth of the sufferer, and drawn tightly toward the jaws, the chains being fastened in a lock. The prisoner's hands were placed in leather gloves which had iron staples in them, through which staples leather straps were introduced, and his arms were crossed behind his back. Other straps were passed around his hands, and then passed between the chains of the gag and the back of his neck. Now his hands were forcibly drawn up to his shoulders, and his head drawn back, this tightening the gag in the mouth, and rendering the agony intolerable. The bits and chains, passing with force

Thus, the isolated confinement to which petitioner Haines was subjected was historically conceived as the humane alternative to the corporal punishments existing at the time of the adoption of the Eighth Amendment to the Constitution of the United States. The question that remains is whether present case law and policy considerations dictate that petitioner's confinement was impermissible. Respondents will establish that this confinement was both permissible and required.

B

PUNITIVE SEGREGATION—JUDICIAL SCRUTINY PURSUANT TO THE EIGHTH AMENDMENT

The general rule circumscribing the limits of federal judicial scrutiny of state prison discipline and administration was clearly enunciated by this Court in *Johnson* v. *Avery*, 393 U.S. 483, 486 (1969):

> "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated."

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against the veins and arteries, necessarily produced a suffusion of blood to the head, and the sufferer, if not speedily relieved, was in great danger of death."

After a legislative investigation, the gag was held to be neither cruel nor unusual. Id, at 221-224.

The specific guidelines for this case, in which the only objection is to the manner of imposing punishment for the violation of a valid prison rule that prohibits fighting between inmates,[19] are found in *Roberts* v. *Pegelow*, 313 F. 2d 548, 550-551 (4th Cir. 1963):

> "So long as the punishment imposed for an infraction of the rules is not so unreasonable as to be characterized as vindictive, cruel or inhuman, there is no right of judicial review of it. If a judge thought that the particular infraction of the rule . . . [should have been punished less severely], his judgment is not to be substituted for that of the prison officials who are responsible for the management of the prison population."

Apparently, there are four ways in which punishment for a particular offense may be unconstitutionally cruel

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19. Rules and Instructions for the Inmate, Illinois State Penitentiary, Menard Branch, p. 25.

Section: General.

Rule 3.

"Fighting, scuffling or violence in any form is strictly forbidden."

Rule 4.

Any inmate participating either actively or passively in a mutiny, riot or insurrection, destruction of State property, attack upon the person of any civilian or employee or inmate will be dealt with very severely, by being deprived of all Statutory Good Time and special disciplinary action and loss of privileges as is warranted and deemed advisable, and prosecution by the Courts of that county in which the institution is located, to the fullest extent of the law.

and unusual. First, if the *kind or type* of punishment imposed, per se, is unnecessarily cruel, it is prohibited. *Trop* v. *Dulles*, 356 U.S. 86, 99 (1958). Second, if the penalty is *greatly disproportionate* to the offense for which it is imposed, it is prohibited. *Weems* v. *United States*, 217 U.S. 349, 368 (1910). Third, if the *means or implementation of a permissible kind of punishment is unnecessarily painful or unreasonably severe*, it is prohibited. *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 464 (1967), *Wilkenson* v. *Utah*, 99 U.S. 130 135 (1878). And fourth, in some situations the mere *fact* of punishment is prohibited. *Robinson* v. *California*, 370 U.S. 660 (1962).

Petitioner, in his pro se Civil Rights Complaint, alleged that the following incidents of his 15 day confinement in punitive segregation for his act of striking another inmate over the head with a shovel taken together constituted impermissibly cruel punishment: 1. the cell was dark; 2. he had to sleep on a concrete floor with three blankets; 3. he had a toilet; 4. he received a regular noon meal plus two slices of bread in the morning and evening every day; 5. no articles of hygiene were furnished him including towel or soap; 6. his false teeth became so rancid that he had to remove them; and 7. he was 65 years old and 30% disabled due to a foot injury.[20]

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20. Although pro se prisoner complaints should be liberally construed, this doctrine does not permit, nor should it, facts to be inferred by the court that may or may not state a cause of action that have not been explicitly set forth. Liberal construction simply means that if an inmate pleads sufficient facts which clearly merit some judicial relief, he ought not to fail entirely because

"The law is clear that imposition of punitive segregation (or solitary confinement) for the violation of prison rules is not, per se, prohibited punishment. *Ford* v. *Board of Managers of New Jersey State Prison,* 407 F. 2d 937, 940 (3rd Cir. 1969); *Krist* v. *Smith,* 309 F. Supp. 497, 499 (S.D. Ga. 1970) affd. 439 F. 2d 146 (5th Cir. 1971); *United States ex rel. Knight* v. *Ragen,* 337 F. 2d 425, 426 (7th Cir. 1964); *Burns* v. *Swenson,* 430 F. 2d 771 778 (8th Cir. 1970); *Graham* v. *Willingham,* 384 F. 2d 367, 368 (10th Cir. 1967). Therefore, this type of punishment and the fact of its imposition are not in issue. The issues that remain, however are twofold: (1) was the prison penalty disproportion to the offense; and/or (2) was the

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he misconceives the nature of the pleadings or mislabels his petition. See: Darr v. Burford, 339 U.S. 200, 203-204 (1950); United States v. Morgan, 346 U.S. 502, 505 (1954); Roberts v. Pegelow, supra, at 549-50; Hancock v. Pate, 223 F. Supp. 202, 203 (N.D. Ill. 1963). Although the general rule is that "a complaint should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief;" Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the specific rule for handling pro se prisoner's complaints in forma pauperis is set out in Carey v. Settle, 351 F. 2d 483, 484-85 (8th Cir. 1965):

> "Prisoners will not lightly be permitted to use 28 U.S.C.A. § 1915(a) to institute suits for damages or injunction against the officials in whose custody they have been placed for confinement.—Such actions are too frequently mere outlets for general discontent in having to undergo penal restraint or of personal satisfaction in attempting to harass prison officials. A court therefore should be satisfied that there exists substantiality as to such a claim, of justiciable basis and of impressing reality before it permits a prisoner to maintain an action therefor on in forma pauperis privilege."

implementation of the penalty unreasonable? A general test would appear to be whether, under all the circumstances cognizable to a court, the present punishment shocks the general conscience or is barbarous when judged in the light of concepts of elemental decency. *Weems* v. *United States*, supra, 217 U.S. at 378; *Robinson* v. *California*, supra, 370 U.S. at 676 (concurring opinion of Mr. Justice Douglas.) It should be noted, however, that within the present context, views held by some present day penologists are not the minimum constitutional standard, and the resultant alleged restrictions of this petitioner's confinement should be reviewed in the light of the requirements of the particular custody and discipline.[21] *Burns* v. *Swenson*, 288 F. Supp. 4, 8 (W.D. Md. 1968) aff'd. 430 F. 2d 771 (8th Cir. 1970). Both

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21. "It must be recognized also that the administration of prison discipline must in many instances be summary, and that the punishment administered to a convict for a violation of prison rules may differ quantitatively and qualitatively from the punishment prescribed by a criminal statute and imposed initially by a court following an individual's conviction of a crime." Tally v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1965. Note also the balancing of the security of the prison with fairness to the individual confirmed in Graham v. Willingham, 384 F. 2d 367 (10th Cir. 1967), Gittlemackfier v. Prasse, 428 F. 2d 1, 4 (3rd Cir. 1970); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969) affd. 435 F. 2d 1255 (3rd Cir. 1971).

22. A—Confinement Determined Not Cruel:

(1.)Landman v. Peyton, 370 F. 2d 135 (4th Cir. 1966)

a) in segregation:
   1) not permitted to work or earn money
   2) received only two meals a day

case law[22] and the cognizable circumstances surrounding this case dictate that petitioner's confinement for fifteen

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3) deprived of radio, television and movie privileges
4) did not have access to the library or educational classes
5) one bath once every week

b) in isolation or punitive segregation:
1) no writing or visiting privileges, except in emergencies
2) the diet consisted of bread and water for two days and two regular "C" building meals on the third day
3) combs, toothbrushes, razors and most other personal items were withheld
4) bedding consisted of a mattress with one or two blankets
5) the clothing provided included a pair of pants, a shirt and a pair of socks

c) confinement in solitary lasted up to 25 days for one continual period
d) tear-gas was used on disruptive inmates in isolation and segregation

(2.) Novak v. Beto, 320 F. Supp. 1206 (S.D. Tex. 1970)

a) cell was furnished with:
1) combination toilet-wash basis
2) *drinking fountain*
3) steel bunk without mattress

b) cell was completely dark
c) generally, one inmate to a cell
d) cell was clean
e) inmate was provided with:
1) cloth gown
2) blanket
3) toothbrush & toothpaste

f) inmate left cell only every other day to take a shower
g) diet:

days in isolation under the conditions as alleged was not unconstitutionally cruel or unusual.

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1) bread and water daily
2) one regular meal every 72 hours

h) maximum confinement was 15 days but the same period may be repeated indefinitely after a two-day break

(3.) Ford v. Board of Managers of New Jersey State Prison, 407 F. 2d 937 (3rd Cir. 1969)

a) solitary confinement from August 26-August 31, 1967
b) no wash bowls or running water
c) unable to wash before eating
d) no showers
e) cell was not cleaned
f) pervasive stench
g) bedding consisted of an old matteress covered with a clean sheet
h) diet consisted of 4 slices of bread plus one pint of water 3 times a day with one full meal every third day

(4.) Carothers v. Follette, 314 F. Supp. 1014, (S.D. N.Y. 1970)

a) inmate in segregation for 4½ months
b) not allowed to work
c) not allowed to participate in the educational programs
d) not allowed to attend religious services
e) not allowed to receive newspapers or magazines
f) commissary privileges restricted
g) no visits for 30 days
h) correspondence privileges limited
i) not permitted a radio, or to watch television or attend movies
j) permitted one hour of recreation per day
k) mus be strip searched before going to the yard
l) not permitted to smoke for 30 days
m) put on a restricted diet

The American Correctional Association acknowledges that prisons should be a place for constructive training,

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n) no sheets for 30 days
o) no hot water
p) permitted one shower per week
q) not permitted to have a hairbrush
r) kept naked for several hours
s) not given a toothbrush or toothpaste for 2-3 days
t) not given a blanket for 5 days

(5.) Sostre v. McGinnis, 442 F. 2d 178 (2nd Cir. 1971)
a) confined for 12 months and 8 days
b) segregated with other inmates
c) reduced diet of 2800-3300 calories per day
d) inmate refused an hour of exercise a day due to the requirement of a strip search
e) shave and shower once a week
f) cell was 6'8'' which included:
1) toilet
2) face bowl
3) running cold water
4) soap and a towel
g) light adequate for reading
h) limited reading materials

(6.) Konigsberg v. Ciccone, 285 F. Supp. 585, (W.D. Mo. 1968)
a) detained nude in a completely barren cell except for a toilet hole for 3½ hours
b) physically handled when he refused to obey the prison rules
c) subjected to an anal inspection

(7.) Gurczynski v. Yeager, 339 F. 2d 884 (3rd Cir. 1964) (placement of an inmate in isolation on a restricted diet not impermissible)

(8.) Rhinehart v. Rhay, 314 F. Supp. 81, (W.D. Wash. 1970)
a) 37 days in solitary confinement
b) confined in complete darkness except during meal time

treatment, and education, but it explicitly recognizes, in addition, that custody, discipline and security are the

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c) no allegations concerning improper bedding, food or temperature

(9.) United States ex rel. Pope v. Hendricks, 326 F. Supp. 699, (E.D. Pa. 1971)

a) keeping a light on for 24 hours not cruel

b) temporary inconveniences of solitary including the food and room temperature not cruel

Accord, United States ex rel. Keen v. Mazurkiewicz, 306 F. Supp. 483, (E.D. Pa. 1969)

(10.) Graham v. Willingham, 384 F. 2d 367 (10th Cir. 1967) (continuous and segregated confinement for more than 2 years in a maximum security unit within the penitentiary not cruel considering inmates involvement in three violent incidents)

(11.) See also, Ruack v. Schoaley, 211 F. Supp. 921 (D. Col. 1962); Blythe v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961); Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966); Ex Parte Pickens, 101 F. Supp. 285 (Terr. of Alaska, 3rd Div. 1951)

B. Confinement Determined To Be Cruel:

1. Wright v. McMann, 387 F. 2d 519 (2nd Cir. 1967)

a. cell was filthy and unsanitary—stank from human wastes

b. cell not adequately heated

c. toilet and sink were encrusted with human excrement

d. confined entirely nude for 11 days

e. denied the use of soap, towel, toilet paper, toothbrush, comb, and other hygiene tools

f. forced to stand at attention between 7:30 a.m.-10:00 p.m. before appearing officer

g. not permitted to sleep between 7:30 a.m.-10:00 a.m.

h. exposed to bitter cold while nude

i. cell was barren

j. had to sleep nude on the barren cold concrete floor

first duties of correctional personnel and must take precedence over all other functions.[23] A positive pro-

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k. had to eat without the semblance of cleanliness
l. confined for 33 days

2. Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969) aff'd. 435 F. 2d 1255 (3rd Cir. 1971)
   a. isolated for 2½ days in maximum security cells —6'9'11"
   b. confined in cramped quarters two to a cell
   c. cell contained no windows or artificial lights
   d. cell contained a single steel bed
   e. denied adequate exercise (1 hour per day)
   f. repeatedly subjected to strip searches
   g. placed nude in the cell
   h. given two blankets
   i. cells were damp and foul due to a malfunctioning toilet
   j. inmates were without toilet articles including soap, towel, or tissue paper
   k. cells were damp and chilly
   l. were on reduced diets
3. Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969)
   a. confined in a concrete cell approximately 5'-8'
   b. cell was unlighted
   c. cell was unproperly ventilated
   d. cell was completely barren except for a hole to receive bodily waste which was flushed from the outside
   e. cell was without water
   f. cell was foul smelling
   g. inmate was denied the use of soap, towel, toilet tissue and other hygienic materials
   h. daily diet consisted of one piece of bread for breakfast and dinner and a regular noon meal
   i. required to sleep completely nude on a concrete floor without blankets
   j. confined 15 days

gram of disciplinary control, including punishment for the purpose of correction and training, maintains the

4. Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969)
   a. cells were approximately 8'-10'
   b. there were no windows
   c. cells were barren except for a concrete toilet and a drinking fountain
   d. toilets could not be flushed from the inside
   e. cells were dirty and unsanitary
   f. cells were permeated by noxious ordors
   g. plain cotton mattresses provided for bedding were uncovered and dirty
   h. cells were overcrowded (average four men to a cell)
   i. inmates who remained 24 hours in their cells generally did not receive the same mattress back
   j. inmates with infectious disease were housed in same block
   k. no exercise
5. Holt v. Sarver, 309 F. Supp. 362 (E. D. Ark. 1970) aff'd 442 F. 2d 304 (8th Cir. 1971)
   a. general confinement at Cummins and Tucker Farm constituted cruel punishment due to:
      1) trusty system ran the prison and possessed the power of life and death
      2) barracks system:
         a) failed to adequately protect the inmate from bodily harm
         b) led to discrimination
         c) permitted the use of beer and whiskey
      3) isolation cells were unsanitary, overcrowded, and indiscriminately used
      4) prisons lacked a rehabilatative program
6. Jordan v. Fitzharris, 257 F. Supp. 674 (N. D. Calif. 1966)
   a. cell was approximately 6 -8'4''
   b. cell was barren except for a concrete toilet that was flushed from the outside only at 8:30 a.m. and 9:00 p.m.

necessary order for the proper functioning of the rehabilitative programs. See also Sostre v. McGinnes, 442

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c. cell was never cleaned
d. inmate vomited and this was not cleaned
e. floor and walls of the cells were covered with human waste
f. no means to clean his hands or face
g. completely nude for the first 8 days
h. cell was not heated
i. required to sleep nude on a coarse canvas mat
j. cell had no adequate ventilation
k. cell was deprived of light
l. inmate was denied medical care
m. inmate was denied the use of water, soap, towel, toothbrush.
n. confined 12 days
o. inmate had only 2 cups of drinking water per day

7. Sinclair v. Henderson, 435 F. 2d 125 (5th Cir. 1970) (allegations of petition from Death Row Inmates meriting a hearing)
   a. must live and eat in a cell in which the toilet constantly "bubbles over"
   b. must drink water "loaded with rust"
   c. came in contact with excessive bacteria
   d. fed from a food cart that was filthy and infested with insects and human hairs
   e. food trays were stained with grease
   f. fed from bread boxes containing roach nest
   g. only permitted out of the cell 15 minutes daily to wash and exercise
   h. denied sunshine and exercise
8. Jackson v. Bishop, 404 F. 2d 571 (8th Cir. 1968) (beating inmates with a strap for discipline cruel)
9. Dearman v. Woodson, 429 F. 2d 1288 (10th Cir. 1970) (being denied food for 50½ hours stated a cause of action as cruel punishment)
10. Jones v Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971) (general state of confinement at Lucas County Jail)

F. 2d 178, 190, n.11 (2nd Cir. 1971) (on validity of compulsory corrective training). In most situations, good con-

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a. inmates confined in cramped quarters
b. quarters were lightless and airless
c. cells were damp and filthy due to leaking toilets (waste spilled onto the floors)
d. inmates were subjected to slow starvation
e. no exercise or recreation
f. little if any medical attention
g. punishment was by confinement in strip cells which:
    1) had no furnishings
    2) had no sanitary facilities of any kind
    3) some were unlighted
    4) unheated
    5) inmates were confined nude
    6) sometimes the cells were overcrowded

11. Krist v. Smith 309 F. Supp. 497 (S.D. Ga. 1970) aff'd 439 F. 2d 146 (5th Cir. 1971) (prolonged administration segregation in a maximum security unit of a penitentiary without any exercise "may well" be cruel)
12. Courtney v. Bishop, 409 F. 2d 1185 (8th Cir. 1969)
    a. arbitrarily placed in solitary
    b. deprived of adequate and sanitary food
    c. deprived of adequate medical and psychiatric treatment
    d. subjected to beatings by prison officials
13. Anderson v. Nosser, 438 F. 2d 183 (5th Cir. 1971) (pre-conviction confinement of civil rights demonstrators)
    a. all male prisoners were stripped nude
    b. all women prisoners had to remove shoes, stockings, sweaters, coats, jewelry, and wigs
    c. all prisoners were forced to consume laxatives
    d. eight persons to a cell
    e. cells contained two steel bunks without mattresses or other bedding, a toilet without a seat, and a washbasin

trol of discipline and securit is maintained by the principle of certainty—that is, certainty that misbe-

f. there were no towels or soap
g. there was not adequate toilet tissues
h. temperature of the cells was between 60-70 and aggravated by exhaust fans
i. several prisoners were kicked, pushed, cursed, and generally abused by the highway patrolman in the courtyard
k. deprived of medicine and sanitary napkins

14. Lollis v. New York State Department of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970) (confinement of 14 year old girl in a New York State Training School under a civil commitment in a stripped room only in night clothes with no recreational facilities or reading material was cruel)
15. Cunningham v. Wingo, —— F. 2d —— No. 20465, (6th Cir. 5-28-71) (depriving inmate awaiting trial of all food for four days and only a small bowl of food every third day for two weeks was inhuman)

C. Common Denomination of Prison Conditions that Constitute Cruel punishment—None of which were present in petitioner's complaint:

1. prolonged nudity
2. overcrowding
3. unjustified physical beatings
4. inadequate food or water
5. absence of adequate ventilation or heat
6. absence of medical care
7. unsanitary living conditions
8. excessive length of confinement in light of conditions

23. Accord, Anderson v. Nosser, 438 F. 2d 183, 190 (5th Cir. 1971); Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970) aff'd. 442 F. 2d 304 (8th Cir. 1971) See also, C. Greeland, "The Three Special Hospitals in England and Patients with Dangerous, Violent or Criminal Propensities," Medicine, Science, and the Law, Vol.

havior will not go unnoticed and that appropriate steps will be taken to correct it. Under the title of "Accepted Disciplinary Practices," the Association lists the use of punitive segregation (or isolation) as a type of disciplinary measure which may be used constructively in the control of prisoners' behavior, especially, when the safety of others or the serious nature of the offense makes it necessary.[24]

The Association recognizes that confinement in isolation may be on a restricted diet with total loss of inmate privileges, although not recommended for more than 15 days. The diet need only be adequate; it may be monotonous and supply only 2,500 calories per day due to the type of confinement. Generally, the cells should be

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10: 93-103 (April, 1970); S. Holleck, "American Psychiatry and the Criminal—A Historical Review," 6 Int. J. Psych., 185-208 (Sept. 1968), S. Shad, "Crime and Mental Illness; Some Problems in Defining and Labeling Deviant Behavior," 53 Mental Hygiene, 21-33 (June 1969); E. Schur, 3 Law and Society, pp. 113, 154-55 (1968); A Heijder, "The Function of Prison: A Study in Administrative Penology," 56 Int. J. of Offender Therapy, (1967); G. Hawkins, "Deterrence; The Problematic Postulate," 2 Aust & N.Z.J. of Crim., 132-148 (1969);

24. Accord, Krist v. Smith, 309 F. Supp. 497, 500 (S.D. Ga. 1970): aff'd. 439 F. 2d 146 (5th Cir. 1971); Kostal v. Tinsley, 337 F. 2d 845 (10th Cir. 1964); United States ex rel. Keen v. Mazurkiewicz, 306 F. Supp. 483, 485 (E.D. Pa. 1969). Note the use of maximum security cells in other jurisdictions: Respondent's Appendix, United States Federal Penitentiaries (Atlanta, Georgia; Terre Haute, Indiana; Leavenworth, Kansas), Texas, and Ohio.

equipped with a washbasin and toilet seat. However, the Association recognizes that it may be necessary to omit the latter equipment because certain inmates will persist in misusing and abusing the plumbing facilities.[25] The cells should be adequately and evenly heated, well ventilated, and not completely dark. Acceptable sanitary conditions should be maintained.[26]

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25. Judge Henley, in Holt v. Sarver, 309 F. Supp supra note 28, at 378, graphically describes the occasional bizarre behavior that prison officials must anticipate from certain inmates placed in isolation:

> "The isolation inmates who are in protective custody are some of the most incorrigible and dangerous prisoners in the Penitentiary. They are sociopathics with no constructive motivation whatever. They damage and destroy fixtures in the cells to the extent of their ability to do so; they set fire to their bedding and to their clothing. They take no interest in the conditions of the cells except to complain about them. They refuse to obey at times the lawful orders of free world people, and obedience has to be compelled by force exerted by free world people and trusty guards; the inmates resist violently and then complain about their ill treatment."

See also, Respondents' Appendix, Illinois, Menard Penitentiary, First through the Fourth photographs.

26. Manual of Correction Standards issued by the American Correctional Association, Ch. 13, pp. 231-57 (1966); See also the report by the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, The Standard Minimum Rules For The Treatment of Prisoners In the Light of Recent Developments In the Correctional Field; pp. 44-45 (working paper prepared by the Secretariat), indicating that four countries still employ corporal punishment of inmates, three countries still use completely dark cells for punish-

When the total circumstances of Haines' situation are viewed as a whole, even the Manual of Correctional Standards, on a fair resolution, dictates that petitioner's confinement as alleged was a reasonable exercise of state penal discretion. Cf., Sharp v. Sigler, 408 F. 2d 966, 971 (8th Cir. 1969).[27] The prison officials at Menard were confronted with the following factors. In 1968, the Menard Penitentiary housed approximately 1200 inmates of heterogeneous criminal, social, and psychological character. On March 10, 1968, a fight occurred between two inmates—one 65 years old and the other 30. Neither the fight nor the age difference between the combatants was an unusual occurrence for the penitentiary. Although 65 years old and partially disabled due to a foot injury, inmate Haines admittedly possessed sufficient strength and dexterity to hit another inmate over the head with a shovel during a verbal disagreement with enough force to cut the recipient's head, necessitating first aid.[28] At no time, either during the prison investigation of the fight or in Haines' petition, does petitioner claim poor health. He was working in the Inside Yard Gang with pick and shovel.

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ment, and several countries still utilize irons to restrain prisoners.

27. The Court in Sharp concluded that when a prison measure is being challenged as unconstitutional, the test is one of reasonableness as cast in the light of the measure taken (reasons for and purposes intended), the security risks involved, and the alternative procedures available.

28. The concept of self-defense, within this context, is neither relevant nor supported by petitioner's allegations. Within a penitentiary, striking another inmate even in response to a verbal threat merits quick and severe discipline.

In view of the aforementioned, what reasonable prison discipline should have been imposed? The revocation of good time was not a viable alternative since Haines was sentenced to a flat life sentence as an habitual burglar. In deference to the suggestion by the American Correctional Association that good control of inmates within a penitentiary is maintained by the application of accepted discipline in an even-handed and certain manner, the prison authorities were left with few acceptable alternatives other than punitive segregation. Not to have punished Haines severely for a serious breach of prison rules would only have weakened the general principle of swift, consistent discipline (i. e., using punishment to effect correction and training for Haines as well as to reinforce its deterrent and directive symbolism to the rest of the inmate population). The 15 days on a restricted diet as alleged were normal incidents of this type of punishment and well within constitutional bounds Haines may well have not been provided with a traditionally framed bed, towel, or soap since the materials in a bed can be ripped apart and either burned, used to jam the plumbing, or fashioned into a weapon. The wrapping of a bar of soap in a towel produces a useful and efficient blackjack; the towel may be fashioned into a garrote. Haines himself could have ripped apart the bedding or attacked a prison guard with a sharpened toothbrush,[29] metal bar, chain, black jack, or other self-

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29. See Respondent's Appendix, Illinois Stateville Penitentiary. Second and Third Photographs; and Menard Penitentiary, Second and Fourth Photographs. Note report in the Chicago Sun-Times, Mon., August 23, 1971, p. 5 concerning murders committed during an attemped prison break in San Quentin Prison—"The other victims found in the adjustment center were apparently slashed to death with two razor blades; one of them mounted on a toothbrush handle."

made weapon fashioned ingeniously from common social articles. Prison officials must take precautions against such conduct and must, due to the limitations of personnel, time and facilities standardize their facilities in regard to achieve this purpose.

Haines did have a toilet and washbasin with running water at his constant disposal.[30] If in fact, Haines' false teeth did become rancid during his isolation confinement, it was the result of his own inaction. The wash basin with running water was available for his use. Three blankets were provided for bedding. At no time did Haines allege the absence of adequate heat, ventilation, exercise, proper medical treatment, or satisfactory sanitation. He did allege that his cell was dark, but not completely without light. The foregoing clearly reveals that Haines was provided with adequate water, food, and basic sanitation—the essentials of survival."[31] See Jordon v. Fitzharris, 257 F. Supp. 674, 682-83 (N.D. Calif. 1966).

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30. The toilet—wash basin—fountain unit shown in the Appendix to Respondent's Brief, Illinois, Menard Penitentiary, Third Photograph was installed as one unit in 1968 before Haines' confinement. The mattress pictured was not installed until 1970. No where in petitioner's complaint does he state that he was without running water, and he admits the presence of a toilet.

31. "We claim too much of our prisons, on whichever system established. We too often judge convicts by false standards. We promise, through all reformed prison systems, too much, even under the most favorable modes of administering them. It is not easy to correct a trivial, inconvenient habit, for a short time indulged; shall a whole life of wrong and mistake be amended by a few years of imprisonment?"

II

PETITIONER WAS AFFORDED DUE PROCESS OF LAW IN HIS PRISON DISCIPLINARY PROCEEDINGS.

> "As a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of procedures. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. Hannah v. Larche, 363 U.S. 420, 442 (1960).

The following relevant allegations were presented by the petitioner to the District Court. On March 10, 1968, Haines "engaged in an argument" with inmates Moore

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Remarks on Prison and Prison Discipline in the United States; Dorothea Dix, p. 67 (1845).

See also Gerber & McAnany, "Punishment: Current Survey of Philosophy and Law" 11 St. Louis Univ. L.J. 491 (1967) containing a description of competing penological concepts and establishing that none has gained general acceptance.

The comments of Ms. Dix and Profs. Gerber and McAnany show clearly the reason why both state and federal courts have refused to recognize a particular penological theory and practice as the one true way and to judge all prison administration by the standards of that theory. It is both wise law and hornbook law that declares that "it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries". Stroud v. Swope, 187 F. 2d 850, 851-52 (9th Cir. 1951); Courtney v. Bishop, 409 F. 2d 1185, 1187 (8th Cir. 1969) cert. denied 396 U.S. 915 (1969).

and Doherty. Haines was approached by the aforementioned two inmates "in a threatening manner" and Haines was asked by one of the two men "if he wanted to start something." Petitioner, not certain, but "thinking it was Doherty" who put the challenging question to him, hit Doherty on the head with (a) shovel". Another inmate, by the name of Orlando, witnessed the scuffle. Officer Duncan, who was in his office some fifteen feet away, came to the scene and broke up the fighting. Subsequently, Officer Rogers "walked" petitioner before Officer Lence, who was the disciplinary officer of the day. Haines said that he struck Doherty over the head with a shovel but refused to explain why. Pending an investigation of the incident, Haines was confined in an isolation cell. When the investigation had been completed and a formal report submitted, Haines was called before Rogers and Lence, again, and read the report written by Officer Duncan. Haines objeced to the written statement of Duncan that Haines had hit the shovel on the Yard Gang Shack floor "and refused to discuss (the) statement of Duncan that he engaged with the other two men." When Haines was provided the opportunity to explain the incident or the reasons for his actions, petitioner "refused to talk to these officers." Haines was confined for 15 days in isolation and was limited in the exercise of his commissary rights for hitting another inmate over the head with a shovel.

By petitioner's own representations, the following is clear: (1) after a verbal confrontation with several other inmates, Haines hit another inmate over the head with a shovel and admitted the same to a prison guard who came to investigate the disturbance; (2) in response to Haines' volunteered statement and the circumstances con-

fronting the prison officials, an investigation was conducted of the incident and a formal report submitted to a committee of two officers not originally involved in the inmate confrontation. Subsequently, with Haines well aware of the charge against him, petitioner was called before the two disciplinary officers and was presented with the investigatory findings of fact. Haines was then given a chance to either rebut the findings or in some way explain his action; petitioner refused to answer other than to object to the statement in the report that he had struck the Yard Gang Shack floor with a shovel.

From the foregoing, it is explicit that the decision of the prison officials to confine Haines for 15 days in isolation and to withdraw certain commissary rights under the circumstances was a reasonable exercise of state penal discretion premised on facts rationally determined. Petitioner was confronted with the accusation, informed of the evidence against him and afforded a reasonable opportunity to explain his actions. Within the prison disciplinary context, due process requires no more.[32]

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32. A. Intra-Prison Discipline and Due Process:
(1.) When federal courts are reviewing state or federal prison disciplinary proceedings, to pass constitutional due process muster, all that is required is a clear showing that the punishment was not imposed arbitrarily or capriciously—the record need only reveal a considered judgment.
Burns v. Swenson, 430 F. 2d 771, 778-81 (8th Cir. 1970)
Graham v. Willingham, 384 F. 2d 367, 368 (10th Cir. 1967)
Theriault v. Blackwell, 437 F. 2d 76, 77 (5th Cir. 1971)

However, counsel for petitioner argues that the foregoing procedures only appear to be fair; but, are not,

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(2.) Sullivan v. Ciccone, 311 F. Supp. 456, 458 (W. D. Mo. 1970)
Admitting the violation of a prison rule negates the requirement of a hearing.

(3.) Sostre v. McGinnis, 442 F. 2d 178, 194-199 (2nd Cir. 1971)
Before substantial deprivations of prison freedoms are to be visited upon a prisoner, the action should be premised on facts rationally determined. In most cases, an inquiry should be held necessitating:
(a) confronting the inmate with the accusation;
(b) confronting the inmate with the evidence against him;
(c) affording the inmate a reasonable opportunity to explain his actions.

(4.) Bundy v. Cannon, —— F. Supp. —— Nos. 70-486 T and 70-1363 T (D.C. Md. 5-26-71)
Before placing an inmate in isolation or reducing good time, due process requires:
(a) adequate notice of misconduct;
(b) impartial decision maker;
(c) confrontation of the accused with his accuser;
(d) opportunity for the accused to question the accuser and present his own witnesses.

(5.) Bershir v. Swenson, —— F. Supp. —— Nos. 1465, 1496, 1541 (W.D. Mo. 6-28-71)
The following disciplinary procedure for a serious rule infraction complied with due process:
(a) inmate advised of the nature of the charge;
(b) inmate appears before an Adjustment Board of three prison officials;
(c) inmate given an opportunity to make any statement;
(d) Board renders its decision.

since Haines was prevented from presenting any meaningful reply because either;

(6.) Carter v. McGinnis, 320 F. Supp. 1092 (W.D. N.Y. 1970)
Before inmate could be lawfully confined in a segregation unit for disciplinary infractions, prison officials were required to present evidence in a hearing with the inmate present.

(7.) Tyree v. Fitzpatrick, 325 F. Supp. 554, 558 (D. Mass. 1971)
The following procedure used by prison officials before placing the inmate in segregation provided at least some assurance of elemental fairness:
(a) inmate given notice of the charge;
(b) inmate was brought before a prison official for a hearing;
(c) inmate was given an opportunity to explain away the charges.

(8.) Meola v. Fitzpatrick, 322 F. Supp. 878, 886 (D. Mass. 1970)
Before the inmate could be substantially punished, elemental procedural due process required:
(a) notice of the charge;
(b) opportunity to reply to them.

(9.) Dabney v. Cunningham, 317 F. Supp. 57, 61 (E.D. Va. 1970)
Placement of inmate in a "padlocked cell" was arbitrary and without reasonable justification since the prison officials had not explained to the inmate why he was locked-up nor did the prison justify his punishment to the court.

(10.) Nolan v. Scafati, 306 F. Supp. 1, 3 (D. Mass. 1969) (Wyzanski, J.) rev. on other grounds; 430 F. 2d 548 (1st Cir. 1970);
Kritsky v. McGinnis, 313 F. Supp. 1247, 1250-51 (N.D. N.Y. 1970)

1. He thought that any statement he made during the the disciplinary hearing could be used against him in a future criminal prosecution for the same act (Pet.'s Brief, p. 20); or,

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Before a prison official imposes a serious penalty upon an inmate, he must:
(a) advise the inmate of the charge;
(b) confront the inmate with the evidence;
(c) provide the inmate with an opportunity to be heard in his own behalf;
(d) reach his decision on substantial evidence.

(11.) Carothers v. Follette, 314 F. Supp. 1014, 1028 (S.D. N.Y. 1970)
Before imposing a serious punishment on an inmate for a prison rule violation, essential elements of fundamental procedural due process requires:
(a) advance notice of the charge;
(b) opportunity to present evidence;
(c) appearance before a relatively objective tribunal.

(12.) Lake, et al. v. Lee, et al. —— F. Supp. —— Nos. 5532-69, 5563-69, 5582-69, 5650-59, 5796-69 (S.D. Ala. 6-30-71)
Before an inmate can be placed in isolation, segregation, or have his good time removed, there must be:
(a) a hearing;
(b) written notice of the charge;
(c) opportunity for the inmate to speak on his own behalf;
(d) inmate must be confronted with the evidence against him.

(13.) Valvano v. McGrath, —— F. Supp. —— No. 70-C-1390 (E.D. N.Y. 5-24-71)
Before imposing punitive segregation upon an inmate, the prison must:

2. He was prevented from presenting a complete reply since he was not made aware that any statement he made during the disciplinary hearing could not

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(a) provide the inmate with notice of the charge;
(b) confront the inmate with the evidence;
(c) provide the inmate with an opportunity to explain his actions
(d) investigate the validity of his explaination

(14.) United States ex. rel Gallagher v. Daggett, 326 F. Supp. 387, 389 (D. Minn. 1971)
Winsby v. Walsh, 321 F. Supp. 523, 526 (C.D. Cal. 1971)
No constitutional right to a full blown administrative hearing prior to the imposition of disciplinary sanctions, such as segregated confinement, for the violation of prison rules.

(15.) Jones v. Robinson, 440 F. 2d 249, 251-52 (D.C. Cir. 1971)
Government hospital mental patient accused of a criminal act could not lawfully be transferred to the maximum security ward for the criminally insane until:
(a) the official conducting the inquiry be neutral;
(b) the official investigates—questioning all the witnesses;
(c) patient should be given an opportunity to respond to the findings.
(c) the patient is given an opportunity to respond to the findings, and if not adverse to hospital interests, patient should be able to confront his accuser and cross-examine him;
(d) the patient be provided lay representation if appropriate;
(e) there be a detailed memorandum of hearing.
Compare with, Clutchette v. Procunier, —— F. Supp. ——, No. C 70-2497 (N.D. Cal. 6-21-71)

be used against him in a future criminal prosecution for the same act (Pet.'s Brief, p. 20-21).

And from these alternate premises, counsel for petitioner suggests that:

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and Farrell v. Joel, 437 F. 2d 160, 163-164 (2nd Cir. 1971)

(16.) Manual of Correctional Standards, The American Correctional Association, Ch. 24 (Discipline), pp. 409-410 (3rd. Ed. 1966):

Hearings. A hearing should take place as soon as practicable after the offense is reported, but it is customary to schedule routine hearings at an hour that interferes as little as possible with work, sickline, etc. If the offense needs immediate investigation, it should be initiated at once and the hearing on the offense may be postponed as long as necessary to complete the investigation. If the offense is serious enough to warrant it or there is a danger that the offender will try to influence witnesses, he may be placed in segregation pending investigation and hearing, but should not be in a punishment status. In some cases inmates should be brought at once to the officials in charge of discipline for questioning.

It is desirable that the more serious or repetitious types of misconduct and offenses be thoroughly investigated. This procedure reduces the incidence of violations through the discovery and correction of bad practices or unreasonable conditions or rules which contributed to the misconduct or offense and reassures the inmate that any hearings will be impartially and fairly conducted.

At the hearing the inmate reported should be given a full opportunity to state his case and, if the offense is a serious one and he claims that

1. Haines should have been given representation by some other person; or,
2. Haines should have been advised that any statements that he made during the prison disciplinary

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witnesses could establish his innocence or bring out important mitigating factors, such claims should be carefully investigated. It is usually not wise or practical to have staff members or inmates appear as witnesses at hearings. The administrative problems involved in having staff members and inmates at the hearing and the possibility of feelings of hate and resentment by the inmate against those testifying makes this practice undesirable in most cases. The soundest practice is to have a staff member investigate and report his findings to the disciplinary officer, including statements of witnesses, where applicable, for use at the time of hearings. In short, the hearing should be an orderly attempt to arrive at the truth and is not a formal court proceeding. As much of the inmate's case history and record of adjustment as is pertinent should be taken into account and not merely his criminal history and previous infractions.

Offenders shall be provided and advised of a regular channel of appeal from the finding made or the penalty assessed at any disciplinary hearing. For example, where a subordinate officer handles routine matters, disposition may be appealed to the Disciplinary Committee. Provision should be made for the inmate to send sealed uncensored letters to the Governor, the Director or Commissioner, or his deputy, and members of the paroling authority.

B. Parole Revocations:

Compare, Washington v. Hogan, 287 F. 2d 332, 334 (3rd Cir. 1960);

hearing were insulated from use in a future criminal trial; or,

3. the prison officials should have investigated further and obtained favorable evidence from inmate Orlando (Pet.'s Brief, p. 22).

Petitioner's asumptions of law and fact are unjustified. Inherent in the problem are distinct issues. First, did the Fifth Amendment privilege against compulsory self-incrimination in a criminal proceednig protect petitioner from not having to answer the prison

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Jones v. Rivers, 338 F. 2d 862, 874 (4th Cir. 1964);
Brown v. Kearney, 355 F. 2d 199, 200 (5th Cir. 1966);
Hinkle v. Ohio Parole Authority, 419 F. 2d 130 6th Cir. 1969);
Hodge v. Markley, 339 F. 2d 973 (7th Cir. 1965);
Douglas v. Sigler, 386 F. 2d 684, 687 (8th Cir. 1967);
Morrissey v. Brewer, 443 F. 2d 942 (8th Cir. 1971);
Dunn v. California Department of Corrections, 401 F. 2d 340, 342 (9th Cir. 1968);
Alvarez v. Turner, 422 F. 2d 214 (10th Cir. 1970). 1970).
In re Tucker, —— Cal. 3rd ——, —— P. 2d —— (No. 13489, 6-24-71)
Johnson v. Stucker, 453 P. 2d 35, (Kan. 1969) cert. denied, 396 U.S. 904;
John v. State, 160 N.W. 2d 37 (N.D. 1969);
Beal v. Turner, 454 P. 2d 624 (Utah 1969);
Baxter v. Commonwealth, 9 Crim. L. Rptr. 2085 (Mass 4-5-71)
with Bey v. Board of Parole, 9 Crim. L. Rptr. 2190 (2d Cir. 5-17-71);
Bearden v. South Carolina, 443 F. 2d 1090 (4th Cir. 1971).

authorities concerning his act, which constituted a serious violation of prison rules. The answer is simply it did not. Even if the prisoner had remained silent when confronted with his act, the penitentiary could still have lawfully disciplined him for remaining silent. The Fifth Amendment privilege that "No person shall . . . be compelled in any criminal case to be a witness against himself, . . ." is not applicable to the prison disciplinary proceedings to the extent that it would have prevented the prison authorities from punishing Haines if he had failed to respond reasonably to questions directly dealing with prison matters. Gardner v. Broderick, 392 U.S. 273, 277 (1968); Uniform Sanitation Men Association v. Commissioner of Sanitation of the City of New York, 392 U. S. 280, 284 (1968); Rodriquez v. McGinnis —— F. 2d —— No. 34567, p. 4749 (2nd Cir. (3-16-71). Haines' right to be free from compulsory self-incrimination can be asserted at the time a criminal prosecution is initiated against him for the same act for which he was disciplined by the penitentiary. Garrity v. New Jersey, 385 U.S. 493 (1967). The proper method and the degree of discipline for Haines if he had remained silent when confronted specifically and directly with questions concerning prison disciplinary matters is something to be circumscribed by reasable prison rules. However, this case does not present that question, since Haines admitted prior to his disciplinary hearing that he had violated a serious prison rule. Furthermore, it can reasonably be inferred that, in this case, there was evidence other than petitioner's initial admission and his later refusal to discuss the matter.

Wihin this context the only constitutional question is whether the imposition of the prison disci-

pline for that act was arbitrarily and capriciously imposed. It is at this juncture that the second issue appears. Need the prison, to be fair in imposing discipline, inform the inmate of a right that he does not have. The answer is an obvious negative.

Finally, in deference to required fairness, should the prison authorities have appointed Haines a representative at the hearing? The facts as alleged did not, nor do prison disciplinary proceedings, per se, require representation. Prison discipline must not only be fair and non-arbitrary, to be effective it must be summary, swift and certain. The presence of counsel or a counsel substitute is not necessary within penitentiaries for fair fact resolutions.[33] It is clear in this case that petitioner's discipline for his admitted act resulted only after a carefully considered judgment by the prison officials after giving Haines an opportunity to explain his action. Both procedural and substantive due process was evident from Haines' allegations. The record before this Court presents no substantial claim pursuant to due process. The claim was properly dismissed.

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33. The suggestion that "Haines could have been afforded representation by another person who would be able to relate Haines' version of the events in question without the personal risks of incrimination" (Petr's. Br. 22) is particularly ill-conceived. Purely aside from the fact that an enunciative explanation is not likely to save a prisoner from discipline, there is no reason to believe that the prisoner's communications to his representative are privileged. Only if an attorney were representing a prisoner would confidentiality be possible and even then the revelation by the attorney of the prisoner's explanation would ordinarily constitute a waiver of the attorney client privilege.

CONCLUSION

In view of the foregoing arguments, the respondents respectfully request this Court to affirm the District Court's dismissal of petitioner's complaint.

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